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ABSTRACT

The right of Human Immunodeficiency Virus (HIV) infected students and staff members to continue in the public school system without disruption has been legally established. However, the question now lies in the legal implications of confidentiality. School districts must implement policies and procedures to ensure medical record confidentiality of HIV positive students and staff. A successful policy covers student, teacher, and community education; evaluation of infected students and staff; as well as confidentiality. The National School Boards Association suggests that school districts designate individuals such as the superintendent, the infected individual's personal physician, a public health official, and anyone chosen by the individual to be informed of the situation. All documentation should be kept in a locked file by the superintendent and access granted only to those with written consent. (EJS)

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THE CONFIDENTIALITY RIGHTS OF HIV-INFECTED INDIVIDUALS WITHIN A SCHOOL

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The Confidentiality Rights of HIV-Infected Individuals Within a School

The presence of HIV-infected students, classified and non-classified employees, and school volunteers has left school admininstrators in a debate regarding the confidentiality rights of such persons. The primary question to be answered is, "Whose rights prevail?" Is it the HIV-infected person's right to privacy or the public's right to know? The school administrator must balance the two within the realm of federal and state laws.

The Center for Disease Control advises employers, including school administrators that the potential of transmitting HIV in the workplace or school environment is not high enough to exclude HIV-infected persons from the workplace or schools or to justify mandatory testing of students, employees, or volunteers (Center for Disease Control, 1985). In fact , the Human Immunodeficiency Virus (HIV) that leads to the disease AIDS can not be transmitted through casual contact, such as hugging and touching. Rather thé virus is spread through intimate behaviors. According to Whitley (1987) the AIDS virus is transmitted in four ways that include the transmission of body fluids. They are sexual contact, contaminated needles, blood tranfusions, and from mother to child in utero (1987). There is also the pos-

sibility that the virus is exchanged from a HIV-mother to child through breast milk (Raper, J. & Aldridge, J., 1988).

Realizing the function and activity of the school environment, the risk of HIV transmission within the setting is low. In fact, the greatest risk of having an AIDS victim in the classroom may be to the AIDS patient (Skeen, P.& Hodson, D., 1987).

It has been proven legally that HIV-infected students are allowed the right to attend school through such federal cases as New York Association for Retarded Children v. Corey (1979) and Parents of Child, Code No. 870901W v. Coker (1989). Likewise, HIV-infected teachers have challenged the right to continue teaching. This has been challenged and upheld through School Board of Nassau County v. Arline (1987) and Chalk v. United States District Court (1988). Section 404 of the 1973 Vocational Rehabilitation Act was cited in a 7-2 decision by the United States Supreme Court to include a person suffering from a contagious disease. Thereby allowing them to continue teaching (Hartog-Rapp, F., 1987). Given the fact that we have resolved the question of whether HIV-infected persons shall remain in the schools, we must now move on to resolve issues surrounding who in the schools shall be informed of a person's HIV status and upon what conditions warrant that information.

Legal Implications of Confidentiality

The uninformed conclusion of the general public is that no medical risk is acceptable where the impact is almost always guaranteed to result in death. It is as if society believes that if they know who has the virus, they can avoid them and therefore reducing their concern about becoming HIV-infected. This commonplace behavior should be replaced by behaviors that avoid the transmission of the virus, i.e. abstinence or protected sexual activity and not sharing needles (Curran, J., Jaffe, H., Hardy, A., Morgan, W., Selik, R., & Dondero, T., 1988). Nevertheless, much effort is spent determining who, if anybody, is HIV-infected. Several federal and state court cases, laws, and statutes protect a person's confidentiality rights.

The Family Educational Rights and Privacy Act (Buckley Amendment) requires the student records to be kept confidential apart from the exceptions in the law and regulations (Broadwell, C. & Strope, J., 1989). Therefore, if a parent voluntarily discloses to school officials a student's medical condition, such record is entitled to all of the protections of the Buckley Amendment (Mawdsley, R., 1986).

The risk of libel and slander increases in a school setting where numerous people have access to the medical records of students and employee (Hartog-Rapp, F., 1987).

Therefore, policies and procedures should be established and maintained within districts and schools to assure that these records are indeed confidential. Personnel policies should also reflect the importance of confidentiality within a person's employment and reprecusions if an employee is in violation of such policies.

In Kansas, school districts are instructed to report contagious and infectious diseases by K.S.A. 65-118, thereby requiring school officials to report HIV infection to the county health officer. This action is used very infrequently since schools are not equiped to serve as testing sites. This Kansas statute also provides for confidentiality and privacy for the HIV-infected person in Section C of the K.S.A. 65-118. It states that all information shall be confidential and shall not be disclosed or made public except: (1) if no person can be identified in the information to be disclosed and the disclosure is for statistical purposes; (2) if all persons who are identifiable in the information to be disclosed consent in writing to its disclosure; (3) if the disclosure is necessary, and only to the extent necessary, to protect the public health; (4) if a medical emergency exists and he disclosure is a medical personnel qualified to treat infectious or contagious diseases; (5) if the information to be disclosed is required in a court proceeding involving child abuse and the information is disclosed in camera (K.S.A. 65-118). It is the subjective status of stating that

disclosure may occur if it is to protect public health (3) that can be the most detrimental to HIV-infected persons. This leeway can be misinterpreted as rationale for breaching confidentiality, especially if a district school board and administrators are ignorant regarding HIV infection and AIDS. Also, it is questionable if a medical emergency would ever exist (4) regarding the HIV infection since the disease process is long term.

The Supreme Court has recognized that students in schools have federal constitutional rights to privacy and reputation. These rights arise over questions of disclosing the identities of students with AIDS. Officials likely will need compelling reasons to justify and disclosures, especially and disclosures beyond those few people who need to know (Broadwell, C., & Strope, J. 1989). School personnel may have varying opinions what constitutes a "compelling reason" to justify disclosure and just "who needs to know". With these subjective words in Broadwell & Strope's interpretation of the Supreme Court ruling it is no wonder that there is controversy.

The due process clauses of the fifth and fourteenth amendments require that proper notice and hearing be given before a property right in attendance, or liberty rights in privacy and reputation, are deprived. In the haste and emotion involved in dealing with AIDS, procedural due process rights may be ignored. Similarly, the likelihood of an arbitrary and capricious decision to remove or segregate the

student may deprive the student of substantive due process. Given the unanimity of medical testimony, any adverse action seems to be a readily apparent substantive due process violation (Broadwell, C. & Strope, J., 1989). School personnel motivated by the fear and impulse that HIV/AIDS causes responds reactively. Therefore, very seldom giving the HIV-infected person (and student's parent or guardian) the opportunity for due process before violating strict confidentiality. This, in itself, can put school districts in violation of the infected person's constitutional rights.

Under K.S.A. 65-118 school are to report HIV infection to the county health officer. However, individuals who oppose state required medical practices may seek remedy through the constitutional right of privacy. Although not specifically enumerated in the Constitution, the Supreme Court does recognize its importance and in 1891 stated:

> No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from restraint or interference of others unless by clear and unquestionable authority of law (Union Pacific Railway Company v. Botsford, 1891).

However the liberty rights enjoyed by persons in this country are not absolute. In Roe v. Wade (1973) the Supreme Court did indicate that the right to personal privacy was an

inherently fundamental constitutional liberty but may be limited by the compelling state interest of protecting the public from the spread of communicable diseases. The importance of personal privacy has been visited by a number of cases involving issues ranging from contraception to abortion demonstrating the courts' concern in protecting this fundamental personal liberty (Welker, M., 1987).

It would appear then that there are constitutional amendments, federal statutes, state statutes, and common law torts that have been tested regarding HIV/AIDS and surely will be retested as the impact of the disease is growing. The cases cited (School Board of Nassau Couty v. Arline, Calk v. United States District Court, New York Association for Retarded Children v. Corey, Parents of Child, Code No. 870901W v. Coker, Roe v. Wade, and Union Pacific Railway Company v. Botaford) will no doubt serve as precedents for future cases. But with the same amount of surety, more cases will emerge to challenge their decisions.

Policy Development That Will Hold Up in Court

In as much as school districts should be proactive in all policy development, it is especilly important in regard to HIV/AIDS. The emotional and explosiveness of the possible situations can be devestating at best. Areas to be covered in a successful policy are student and employee HIV/AIDS

education and information regarding Universal Safety Precautions for Prevention and Transmission of HIV (Center for Disease Control, 1988), community awareness and education, evaluating students and school staff members who are infected with HIV, and confidentiality.

Because of the unique nature of HIV/AID and ongoing research about the disease, it is suggested that school districts have a separate policy from other contagious and/or infectious diseases. This will allow the policy to be tailored toward the HIV-infection and therefore become more useable if and when a situation arises. In districts that utilize school volunteers, it is also important to include them in the district's policy.

The National Association of State School Boards (1989) suggests that school districts predetermine designated individuals in the district to be involved in the decision making process to determine if a HIV-infected person constitutes a medically recognized risk of transmission in the school setting. They are (1) the superintendent, or person designated by the superintendent to be responsible for the decision; (2) the personal physician of the infected person; (3) a public health official that will not have knowledge of the identity of the infected individual. The HIV-infected person (and a student's parent or guardian) may include as many other individuals as they see fit into the decisionmaking process. They may chose to include the school nurse or principal, but it is at the HIV-infected person's (and student's parent of

guardian's) discretion whether to include additional persons. This group of people can be termed the decisionmakers that will be concerned with the welfare of the HIV infected person as well as the welfare of the school setting.

Since HIV is not transmitted through behavior that are permitted at school, the identity of a student or staff member who is infected with HIV need not be shared with many people. Further, the more people who know, the greater the chance that one of them will reveal the name and expose the school system to a civil suit. No single set of rules fits all circumstances, but all decisions should be made cooperatively with he infected person or a student's parents or guardian (National Association of State School Boards, 1989).

Staff members who are infected with HIV can decide whether they want their collegues or students to know about the illness, but no one needs to know. The decision to tell their superviser will be largely dependent on their supervisor's and district's policy and attitude regarding HIV. If the identity of a student or employee infected with HIV becomes generally known, and the district has not conducted HIV education for their students, staff, and patrons, the HIV-infected person is likely to be stigmatized, ostracised and deprived of the benefits of a public school education or of employment.

The school district's decisionmakers (those predetermined to oversee the HIV-infected person's and the school's well-being) should treat all information as highly

confidential at the risk of "jeopardizing" a person's constitutional rights. No information should be divulged to other individuals in the district or elsewhere (except under K.S.A. 65-118). All medical information and written documentation of discussions, telephone conversations, proceedings, and meetings should be kept by the superintendent in a locked file. Access to the file should only be granted to those persons who have the written consent of the infected staff member or the infected student's parent or guardian. To further protect confidentiality, names will not be used in documents except when this is essential. Any document containing the names, or any other informatin that would reveal the identity of the infected person will not be shared with any person, not even forthe pruposes of word processing or reproduction (National Association of State School Boards, 1989).

Successful Implementation of HIV Policy that Promotes Confidentiality

When 100 superintendents from among 500 identified as outstanding by Executive Educator in 1987 were asked which individuals in a school district should have access to the results of tests for HIV infectio, the superintendents responded: (1) access to professional employees' test results should be limited to the superintendent and the

personnel officer; (2) access to students' test results should be limited to the superintendent, the personnel officer, and the health officer; (3) in all cases, access to test results should be limited to those schoolpeople who need to know. Furthermore, the superintendents placed principals and classroom teachers low on the list of individuals who should be given access to test results. They placed school board members at the bottom of the list (Keough, K. & Seaton, G, 1988). If this survey is reflective of the attitudes of most superintendents, it shows little resistance to protecting confidentiality. However, limiting the information to "schoolpeople who need to know" should be narrowed down in policy. The less people involved, the more assurance of con-fidentiality there is.

In New York City in 1988, city health officials estimated that there was as many as 1,000 infected chilren in the city. The identity of those children are not known to school officals. Their identity is kept secret by a health department panel that makes the decision on whether each child with AIDS identified by number only, should be allowed to attend school. In Traverse City, Michigan, the decision was made that only the teacher would know the identity of a child with AIDS. In Texas, it is now illegal under state law to notify a teacher that a child has AIDS unless the child's parents give consent to do so (Reed, S., 1988). It is apparent that school districts and states have handled the issue of confidentiality in various ways according to their

state statues. Modifications and revisions are inevitible.

Conclusion

There are benefits for the HIV infected person to tell of their disease. Theoretically, schools assist their students and employees when they are in time of need. This is evident in the employment of school counselors, socialworkers, and school nurses, as well as the increasing implementation of student assistance programs and employee assistance programs. However these elements are not enough in themselves. There must also be a committment against ignorance regarding HIV/AIDS and a committment for the education of students, employees, and community.

The key question surrounding a school's decisionmaking involvement should center around medical answers. They include: Are there any secondary infection present that are contagious? What environment is best for the HIV student's educational, medical, and emotional well-being? What is the best working environment for HIV-infected individual?

Realistically, school boards, administrators, teachers, and students will never know everyone that is HIV-infected in their schools. Many people never get tested, dery their HIV infection, or choose never to tell. Therefore, knowledge of the HIV-infected person's identity may give schools a false sense of security. If school personnel and students

believe that they know the identity of all HIV-infected persons, they may just follow Universal Safety Precaution for those identified persons and continue risky behaviors (i,e, not providing barriers for blood spills) with the remaining population of their schools. This is why we as members of society need to treat everyone as if they have the HIV, since we no not who is infected.

Schools can not unconditionally guarantee the school population that HIV will never be transmitted in the school environment, such as we can not guarantee society the same. But as school officials, we can promote the Universal Safety Precautions described to us by the Center for Disease Control as a method of preventing the spread of HIV. This is a far more effective approach than singling out HIV-infected individuals. And just as important, we need to protect the confidentiality of HIV-infected individuals, offer educational and emotional assistance and serve as a role model for the understanding of those less fortunate, not promote irrational fear.

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